OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

January 21, 2026

To:

Hon. Wynne P. Laufenberg
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Philip J. Brehm
Electronic Notice

Sarah Burgundy
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2024AP1973-CR State of Wisconsin v. Justin E. Klein (L.C. #2020CF903)

Before Neubauer, P.J., Grogan, and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Justin E. Klein appeals from a circuit court judgment convicting him of two counts of possession of child pornography after he entered guilty pleas to the charges. He also appeals from an order denying his postconviction motion. Klein argues that he is entitled to resentencing because the State breached its agreement with Klein by informing the court of the sentencing recommendation made in the presentence report. Based upon our review of the briefs and

Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).[1] We summarily affirm.

The parties do not contest the facts pertinent to this appeal. The State charged Klein with ten counts of possession of child pornography after discovering sexually exploitative images of children on a laptop computer and a USB drive owned by Klein. Pursuant to an agreement with the State, Klein entered guilty pleas to two of the charged counts. The State agreed to dismiss and read in the remaining counts, to recommend six to eight years of initial confinement followed by a period of extended supervision, and to "take no position" as to whether the sentence should run consecutively or concurrently.

The circuit court ordered that a presentence report be prepared prior to sentencing. The court sentenced Klein to two fifteen-year terms, each comprised of eight years of initial confinement and seven years of extended supervision, to be served consecutively to each other and to Klein's existing sentences.

Klein filed a postconviction motion seeking resentencing. He argued that his trial counsel was ineffective for not objecting when the prosecutor, in his view, did not remain neutral regarding how Klein's sentences should run. Klein took issue with the prosecutor having informed the circuit court that, pursuant to the plea agreement with Klein, the State was to remain silent as to whether the court should impose concurrent or consecutive terms, but then stating that the presentence report writer recommended consecutive terms. Klein called the prosecutor's statement "an end run around the plea agreement." After holding an evidentiary

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

hearing, the circuit court denied Klein's postconviction motion. Klein appeals, renewing his argument that the prosecutor breached the plea agreement.

A defendant has a constitutional right to enforce a negotiated plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). "[O]nce the defendant has given up his [or her] bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled." ***Id.*** (citation omitted). A plea agreement is breached when the prosecutor does not make the negotiated sentencing recommendation. ***Id.*** at 272. To be actionable, however, a breach must not be merely technical but, rather, must deprive the defendant of a material and substantial benefit for which he or she bargained. ***State v. Bangert***, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986). If the breach is material and substantial, a defendant may be entitled to resentencing or plea withdrawal, as the sentencing court, in its discretion, deems appropriate. *See* ***State v. Howard***, 2001 WI App 137, ¶¶36-37, 246 Wis. 2d 475, 630 N.W.2d 244. Whether the State breached the plea agreement and, if so, whether the breach was material and substantial are questions of law that we review de novo. *See* ***State v. Quarzenski***, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844.

Klein argues that the prosecutor breached the plea agreement when he informed the court of the recommendation in the presentence report that Klein be sentenced to consecutive terms rather than concurrent. We disagree. The prosecutor did not endorse the views of the presentence report writer—those recommendations were clearly distinguishable from the agreed-upon sentencing recommendation. *Cf.* ***State v. Clement***, 153 Wis. 2d 287, 301-02, 450 N.W.2d 789 (Ct. App. 1989) ("The plea agreement applied to the prosecutor's recommendation alone. There is no evidence that the prosecutor advised or encouraged the victim and her

fianc[é] to recommend the maximum sentence."). Although the circuit court ultimately imposed a consecutive sentence in this case, it was not due to a breach of the plea agreement by the State.

We briefly address Klein's attempt to distinguish the prosecutor's remarks here from those in ***Clement***. In ***Clement***, the defendant sought to withdraw his plea. He claimed "the prosecutor violated the plea agreement by using the term 'constrained' in describing the plea agreement to the court, by praising the presentence report, which recommended the maximum sentence, and by sponsoring statements of the victim and her fianc[é] who also recommended the maximum sentence." ***Id.***, 153 Wis. 2d at 300. We held there was no breach by the prosecutor there despite that the prosecutor indicated he was "constrained" by the plea agreement not to make a specific recommendation, yet highlighted the seriousness of the crime and conveyed the recommendations of the presentence report writer and others for a maximum sentence. Klein argues that ***Clement*** is readily distinguishable from the situation here because the circuit court, not the prosecutor, first referenced the recommendation from the presentence report. Klein further submits that ***Clement*** is inapplicable because it did not directly discuss the situation presented here.

These distinctions are without a difference. In upholding Clement's conviction, this court determined the prosecutor did not breach the plea agreement by stating the recommendations of the presentence report writer and others. As explained, "[t]he plea agreement applied to the prosecutor's recommendation alone[,]" and there was no evidence that the prosecutor had influenced the others to request the maximum sentence. ***Id.*** at 302. Such is the case here as well. Klein offers nothing to show that the prosecutor had any obligation not to inform the court of the presentence report recommendation or that the prosecutor here had any influence on the

recommendation for consecutive sentences. As such, there was no breach of the plea agreement here.

Finally, we conclude that because a challenge based on a breach of the plea agreement by the prosecutor was meritless, Klein's trial counsel was not ineffective for failing to pursue it. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). At the postconviction hearing here, Klein's trial counsel testified that she did not consider objecting to the prosecutor's comment at sentencing because she "didn't think there was anything wrong with this statement." Counsel explained that "[t]he offer [the State] put on the record is the offer [that was sent] to me[,]" and that it is "a regular occurrence" for the State to "put the PSI recommendation on the record[.]" We agree and conclude that any objection at sentencing to the prosecutor's statement would have been without merit. Thus, counsel was not ineffective for failing to object to the prosecutor's statement.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals